RECORD AND BRIEFS

FILED
JUN 15 2016
OFFICE OF THE CLERK

No. 15-1391

IN THE

Supreme Court of the United States

EXPRESSIONS HAIR DESIGN, LINDA FIACCO, BROOKLYN FARMACY & SODA FOUNTAIN, INC., PETER FREEMAN, BUNDA STARR CORP., DONNA PABST, FIVE POINTS ACADEMY, STEVE MILLES, PATIO.COM, and DAVID ROSS.,

Petitioners,

v.

ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York; CYRUS R. VANCE, JR., in his official capacity as District Attorney of New York County; KENNETH P. THOMPSON, in his official capacity as District Attorney of Kings County.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

ILYA SHAPIRO
Counsel of Record
Cato Institute
1000 Mass. Ave. N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

June 15, 2016

QUESTION PRESENTED

Ten states have enacted laws that allow merchants to charge higher prices to consumers who pay with a credit card instead of cash, but require the merchant to communicate that price difference as a cash "discount" and not as a credit-card "surcharge."

The question presented is:

Do these state no-surcharge laws unconstitutionally restrict speech conveying price information (as the Eleventh Circuit has held), or do they regulate economic conduct (as the Second and Fifth Circuits have held)?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. COLLUSION BETWEEN CREDIT CARD COMPANIES AND STATE LEGISLATURES CANNOT BE USED TO CIRCUMVENT PROTECTED SPEECH 2

A. The Framers Sought to Protect Speech from the Type of Crony Capitalism the New York Statute Manifests 2

B. New York's Legislature Has Been Lobbied to Insulate Credit Card Companies from Consumer Knowledge in the Market 6

II. THIS COURT SHOULD GRANT CERTIORARI TO ENSURE CONSTITUTIONAL PROTECTION FOR THE FREEDOM OF SPEECH—COMMERCIAL OR OTHERWISE 8

A. The First Amendment Protects Content Restrictions on Speech, Regardless Whether It Is Commercial in Nature 8

B. This Case Underscores the Need for Coherence and Clarification, Particularly Given Conflicting Precedent 11

CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

Cases

44 Liquormart, Inc. v. Rhode Island,
517 U.S. 484 (1996) 9-10

BellSouth Telecomm., Inc. v. Farris,
542 F.3d 499 (6th Cir. 2008) 10

Carey v. Population Servs. Int'l,
431 U.S. 678 (1977) 5

Dana's Railroad Supply v. Attorney General, Florida, 807 F.3d 1235 (11th Cir. 2015) 12

Expressions Hair Design v. Schneiderman,
975 F. Supp.2d 430 (S.D.N.Y. 2013) 7, 10, 11

Florida Bar v. Went For It, Inc.,
515 U.S. 618 (1995) 9

Greater New Orleans Broadcasting Ass'n, Inc. v. United States, 527 U.S. 173 (1999) 9, 10

Ohralik v. Ohio State Bar Ass'n,
436 U.S. 447 (1978) 9

People v. Fulvio,
517 N.Y.S.2d 1008 (Crim. Ct. 1987) 7-8

Riley v. Nat'l Fed'n of the Blind,
487 U.S. 781 (1988) 10

Sorrell v. IMS Health Inc.,
564 U.S. 552 (2011) 5

Thompson v. W. States Med. Ctr.,
535 U.S. 357 (2002) 9

United States v. Stevens,
130 S. Ct. 1577 (2010) 9

TABLE OF AUTHORITIES

Cases: Page

American Meat Inst. v. *United States Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) 22
Butner v. *United States*, 440 U.S. 48 (1979) 35
Central Hudson Gas & Elec. Corp. v. *Public Serv. Comm'n*, 447 U.S. 557 (1980) 11, 18, 21
Cutter v. *Wilkinson*, 544 U.S. 709 (2005) 34
Edward J. DeBartolo Corp. v. *Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568 (1988) 21
Florida Bar v. *Went For It, Inc.*, 515 U.S. 618 (1995) 19
44 Liquormart, Inc. v. *Rhode Island*, 517 U.S. 484 (1996) 16, 17
Holder v. *Humanitarian Law Project*, 561 U.S. 1 (2010) 32
Ibanez v. *Florida Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136 (1994) 31
Milavetz, Gallop & Milavetz, P.A. v. *United States*, 559 U.S. 229 (2010) ..... *passim*
Minneapolis Star & Tribune Co. v. *Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) 17
Munn v. *Illinois*, 94 U.S. 113 (1877) 16
National Ass'n of Tobacco Outlets, Inc. v. *City of Providence*, 731 F.3d 71 (1st Cir. 2013) 20
People v. *Fulvio*, 517 N.Y.S.2d 1008 (N.Y. Crim. Ct. 1987) 34
R.A.V. v. *City of St. Paul*, 505 U.S. 377 (1992) 30
R.M.J., In re, 455 U.S. 191 (1982) 21, 22
Railroad Comm'n v. *Pullman Co.*, 312 U.S. 496 (1941) 12
Reed v. *Town of Gilbert*, 135 S. Ct. 2218 (2015) 29, 30
Rubin v. *Coors Brewing Co.*, 514 U.S. 476 (1995) 32

Cases—Continued: Page

Rumsfeld v. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006) 17
Sorrell v. *IMS Health, Inc.*, 564 U.S. 552 (2011) 17, 18, 30
Thompson v. *Western States Med. Ctr.*, 535 U.S. 357 (2002) 16
Turner Broad. Sys., Inc. v. *FCC*, 512 U.S. 622 (1994) 24
United States v. *Alvarez*, 132 S. Ct. 2537 (2012) 17
United States v. *Williams*, 553 U.S. 285 (2008) 32, 33
Virginia State Bd. of Pharm. v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) 17
Ward v. *Rock Against Racism*, 491 U.S. 781 (1989) 33
Wisconsin v. *Mitchell*, 508 U.S. 476 (1993) 18
Zauderer v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985) ..... *passim*

Constitution, statutes and regulations:

U.S. Const. Amend. I ..... *passim*
Act of Feb. 27, 1976, Pub. L. No. 94-222, 90 Stat. 197:
§ 3, 90 Stat. 197 5
§ 3(a), 90 Stat. 197 5
§ 3(c)(1), 90 Stat. 197 6
§ 3(d), 90 Stat. 198 6
Cash Discount Act, Pub. L. No. 97-25, 95 Stat. 144 7
§ 101, 95 Stat. 144 7
§ 102(a), 95 Stat. 144 ..... 7, 8
§ 103, 95 Stat. 144 7
§ 201, 95 Stat. 144 7
Fair Credit Billing Act, Pub. L. No. 93-495, Tit. III, § 306, 88 Stat. 1515 3
Truth in Lending Act, Pub. L. No. 90-321, Tit. I, 82 Stat. 146 2

Statutes and regulations—Continued: Page

§ 106(a)(1), 82 Stat. 148 2
15 U.S.C. 1602(p) (1982) 6, 2a
15 U.S.C. 1602(q) (1982) 6, 8, 24, 2a
15 U.S.C. 1602(q) 9
15 U.S.C. 1602(r) 9
15 U.S.C. 1602(x) (1982) 7, 8, 24, 25, 27, 32
15 U.S.C. 1602(y) 9
15 U.S.C. 1666f(a) 9
15 U.S.C. 1666f(a)(2) (1982) ..... *passim*, 3a
15 U.S.C. 1666f(b) (1982) 29, 3a
15 U.S.C. 1666f(b) 7, 9
15 U.S.C. 1666j(c) 6, 9
38 U.S.C. 3705(a) 20
42 U.S.C. 1981 20
N.Y. Gen. Bus. Law (McKinney 2012):
§ 396-r(3)(b)(ii) 20
§ 518 ..... *passim*, 1a
12 C.F.R.:
Section 226.2(tt) (1981) 7
Section 1026.5(a)(1)(A) 9
Section 1026.9(d)(1) 9

Miscellaneous:

Cash Discount Act: Hearing Before the Subcomm. on Consumer Affairs of the Senate Comm. on Banking, Housing & Urban Affairs, 97th Cong., 1st Sess. (1981) 6, 7

Miscellaneous—Continued: Page

FCBA Two-Tier Pricing and Procedures for Federal Reserve Board Regulation Writing: Hearing Before the Subcomm. on Consumer Affairs of the Senate Comm. on Banking, Housing & Urban Affairs, 94th Cong., 1st Sess. (1975) 4, 5, 28, 29

43 Fed. Reg. 3899 (Jan. 30, 1978) 33

S. Rep. No. 23, 97th Cong, 1st Sess. (1981) ..... *passim*

The Fair Credit Billing Act Amendments of 1975: Hearing Before the Subcomm. on Consumer Affairs of the House Comm. on Banking, Currency & Housing, 94th Cong., 1st Sess. (1975) 5

Fredrick Schauer, *Categories and the First Amendment*, 34 Vand. L. Rev. 265 (1981) 18

U.S. Gov't Accountability Office, GAO-10-45, *Credit Cards* (Nov. 2009) 2

themselves from market-forces at the expense of people's individual rights.

The Framers, however, drafted the Constitution with prevention of special-interest legislation—whether the credit card lobby or any other—in mind. Indeed, the idea of "factions" affecting the public interest was addressed by James Madison in Federalist 10. While Madison conceded that such interests could not be stopped completely, he acknowledged that certain steps could be taken to mitigate the "effects" of these groups, and the damage that they can do.

The First Amendment is one such protection. The right of the people to speak—even as to matters of economic concern—are to be protected by the fullest extent of judicial review. When New York passed a law restricting how merchants were to speak—at the direction of the credit-card lobby—it abridged merchants' right to convey their pricing schemes, as well as the public's right to know about them.

ARGUMENT

I. COLLUSION BETWEEN CREDIT CARD COMPANIES AND STATE LEGISLATURES CANNOT BE USED TO CIRCUMVENT PROTECTED SPEECH

A. The Framers Sought to Protect Speech from the Type of Crony Capitalism the New York Statute Manifests

At the heart of this case is the practice known as "crony capitalism:" a system that has been broadly described as interest groups seeking favors from government. *See* Mancur Olson, *The Rise and Decline of Nations: Economic Growth, Stagnation, and Social Rigidities* (1985). But in reality, the term as a de-

In the Supreme Court of the United States

No. 15-1391

EXPRESSIONS HAIR DESIGN, ET AL., PETITIONERS

v.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL OF NEW YORK, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING NEITHER PARTY

INTEREST OF THE UNITED STATES

This case concerns the application of the First Amendment to a state statute that regulates merchants who charge higher prices to customers paying by credit card than to customers paying by cash. That state statute was enacted following the expiration of a temporary federal law that addressed the same subject, and it replicates portions of the federal statute's language. See Pet. App. 5a-8a. In addition, the analysis that the Court adopts in this case may have significant ramifications for current federal regulation of pricing and related activities. The United States therefore has a substantial interest in the Court's disposition of this case.

STATEMENT

1. In order for a merchant to accept payment by credit card, it must pay the credit-card issuer (and, potentially, an intermediary bank) a fee on each credit-card transaction. Pet. App. 3a; see U.S. Gov't Accountability Office, GAO-10-45, *Credit Cards* 6-9 (Nov. 2009). The total fee is typically about one to three percent of the purchase price, although the precise amount varies depending upon, *inter alia*, the specific card that a customer uses. *Credit Cards* 9-11, 17.

Some merchants seek to recoup the fee or to discourage the use of credit cards by charging a higher price when a customer pays by credit card than when the customer pays by cash (or by check, debit card, or other equivalent means). Pet. App. 3a. Because merchants may incur different fees when accepting different cards, a fixed additional charge for credit-card customers may, in the context of a particular credit-card transaction, be higher or lower than the fee that the merchant must pay.

2. Since its enactment in 1968, the Truth in Lending Act (TILA), Pub. L. No. 90-321, Tit. I, 82 Stat. 146, has regulated the manner in which merchants are required to inform consumers of additional charges for credit-card purchases.

a. TILA originally defined the "finance charge" for a credit transaction to include "any differential between the price for cash transactions and the price for credit transactions." S. Rep. No. 23, 97th Cong., 1st Sess. 1 (1981) (1981 Senate Report) (quoting TILA § 106(a)(1), 82 Stat. 148). By defining the "finance charge" in that manner, the statute required that those differentials be "disclosed to credit customers." *Ibid.*

In practice, however, including such differentials in the finance charge "effectively precluded" merchants from "operating under two-tier pricing systems" that distinguished between cash and credit-card purchases. 1981 Senate Report 1. Adopting such a differential scheme would have resulted in a finance charge being "imposed by the seller at the point of sale," potentially triggering violations of both TILA (if the finance charge were not disclosed) and state usury laws. *Ibid.*

b. In 1974, Congress amended TILA to exclude from the definition of "finance charge" certain "discount[s]" of up to five percent offered by a merchant to "induc[e] payment by cash, check, or other means not involving the use of a credit card." Fair Credit Billing Act (FCBA), Pub. L. No. 93-495, Tit. III, § 306, 88 Stat. 1515. The exclusion applied only if the discount was "offered to all prospective buyers and its availability [was] disclosed to all prospective buyers clearly and conspicuously" pursuant to implementing regulations promulgated by the Federal Reserve. *Ibid.* The amended version of TILA also foreclosed credit-card issuers from contractually prohibiting merchants from offering discounts for cash purchases. *Ibid.*

The amended law's reference to "discounts," rather than to price differentials more generally, sparked debate about whether to distinguish, for regulatory purposes, among three types of pricing systems: (1) an express "discount" system in which "a percentage of the tagged price is deducted to arrive at the cash price"; (2) a "surcharge system * * * in which the tagged price is the cash price and a premium or surcharge is added to the tagged price if the customer chooses to use a credit card"; and (3) a "two-tag sys-

tem * * * in which all merchandise is tagged with two prices, one for cash and one for credit." *FCBA Two-Tier Pricing and Procedures for Federal Reserve Board Regulation Writing: Hearing Before the Subcomm. on Consumer Affairs of the Senate Comm. on Banking, Housing & Urban Affairs*, 94th Cong., 1st Sess. 2-3 (1975) (*1975 Senate Hearing*) (statement of Federal Reserve Board member); see 1981 Senate Report 2. The Federal Reserve asked Congress to resolve that debate. See 1981 Senate Report 2.

During congressional hearings, one of several points emphasized by advocates of treating surcharge systems differently from other pricing systems was the importance of preventing consumer confusion or surprise when a decision to pay by credit card results in a higher price. A Federal Reserve Board member, echoed by representatives of both a consumer-advocacy group and a credit-card issuer, expressed concern that "different types of pricing systems from one store to the next may tend to confuse consumers and frustrate comparison shopping." *1975 Senate Hearing* 8; see *id.* at 4 (similar); *id.* at 124 (statement of Consumer Federation of America representative); *id.* at 178-179 (statement of American Express representative). "Since one store might discount while another surcharges," he explained, "a simple comparison of tagged prices would not indicate which price is cheaper. The customer would have to perform a mathematical computation to compare the prices, and consumers could find this burdensome and confusing." *Id.* at 8.

The legislative director for the Consumer Federation of America similarly took the view that "[c]onsumers should not have to endure the confusion which

would result from a wide variety of methods of advertising the price of an item," and that "[m]erchants should not be allowed to benefit from the increased volume generated by the posting of a credit card symbol on the window, only to then discourage use of the credit card by imposition of a surcharge." *1975 Senate Hearing* 123-124; see *The Fair Credit Billing Act Amendments of 1975: Hearing Before the Subcomm. on Consumer Affairs of the House Comm. on Banking, Currency & Housing*, 94th Cong., 1st Sess. 8, 13-14 (1975) (*1975 House Hearing*) (same). Banking organizations informed Congress that, in the case of surcharges, "a posting of a sign at entrances may not be sufficient * * * to prevent something akin to the troublesome 'bait and switch' technique." *1975 Senate Hearing* 85-86; see *id.* at 170 (similar from American Express representative); see also *1975 House Hearing* 90 (same). Those organizations explained that "[a] fundamental difference between a discount policy and a surcharge policy, which aggravates the disclosure problem, is that advertising containing a product price under a discount scheme will at worst" cause a consumer who "arrives at a store" to learn "that the cash price is *lower* than was advertised. The contrary is true if a surcharge is applied." *1975 Senate Hearing* 86.

c. In 1976, Congress amended TILA to distinguish between discounts and surcharges. Act of Feb. 27, 1976 (1976 Act), Pub. L. No. 94-222, § 3, 90 Stat. 197. The amendment defined "discount" as "a reduction made from the regular price" and defined "surcharge" as "any means of increasing the regular price to a cardholder which is not imposed upon customers paying by cash, check, or similar means." § 3(a), 90 Stat.

197 (15 U.S.C. 1602(p) and (q) (1982)); see 15 U.S.C. 1602(p) (1982) ("The term 'discount' * * * shall not mean a surcharge."). Under the amended TILA, the two types of differential-pricing schemes were subject to different regulatory treatment.

The amendment supplemented the preexisting exclusion of certain clearly-disclosed discounts from the definition of "finance charge" by providing that such discounts would also be exempted from state-specific usury and disclosure laws. 1976 Act § 3(d), 90 Stat 198 (15 U.S.C. 1666j(c)). The amendment also contained a temporary rule, set to expire in three years, that prohibited merchants from "impos[ing] a surcharge on a cardholder who elects to use a credit card in lieu of payment by cash, check, or similar means." § 3(c)(1), 90 Stat. 197 (15 U.S.C. 1666f(a)(2) (1982)).

That temporary surcharge rule was later extended for an additional two years. 1981 Senate Report 2. Before that extension expired, Congress held a hearing on a proposal to again extend the rule. See *Cash Discount Act: Hearing Before the Subcomm. on Consumer Affairs of the Senate Comm. on Banking, Housing & Urban Affairs*, 97th Cong., 1st Sess. (1981). A Federal Reserve Board member testified at the hearing that the "economic distinction" between discounts and surcharges was "at best, uncertain," *id.* at 9, and urged Congress to replace the existing rule with a uniform disclosure requirement applicable to both discounts and surcharges, *id.* at 10. Representatives of consumer groups likewise opposed extending the surcharge rule, although representatives of the credit-card industry favored it. Compare, *e.g.*, *id.* at 92 (statement of Consumer Federation of America representative), with *id.* at 43 (statement of American

Express representative). The sponsor of the extension bill expressed the view that the surcharge rule "ha[d] served consumers well by preventing bait and switch type tactics." *Id.* at 1-2 (statement of Sen. Chafee).

d. In 1981, Congress updated, but did not substantially alter, TILA's preexisting framework for discounts and surcharges. See Cash Discount Act (CDA), Pub. L. No. 97-25, 95 Stat. 144. The 1981 amendment extended the surcharge rule for another three years, § 201, 95 Stat. 144; removed the five-percent ceiling on cash discounts that could be excluded from the finance charge, § 101, 95 Stat. 144 (15 U.S.C. 1666f(b)); and limited the Federal Reserve's role in defining the sorts of "clear[] and conspicuous[]" disclosures required for such discounts, *ibid.*; see § 103, 95 Stat. 144.

The amendment also "further clarified" the distinction between discounts and surcharges by enacting a statutory definition (drawn largely from a preexisting regulatory definition) of the "regular price" that would be used as the baseline for classifying a particular pricing scheme into one category or the other. Pet. App. 6a; see 1981 Senate Report 3-4; see also 12 C.F.R. 226.2(tt) (1981). The new statutory definition specified that, if only "a single price [were] tagged or posted" by a merchant, that single price would be the regular price. CDA § 102(a), 95 Stat. 144 (15 U.S.C. 1602(x) (1982)). If "no price [were] tagged or posted," however, or if "two prices [were] tagged or posted, one of which is charged when payment is made by * * * credit card and the other when payment is made by use of cash, check, or similar means," the

regular price would be "the price charged * * * when payment is made by * * * credit card." *Ibid.*

Because TILA continued to define a "surcharge" as "increasing the regular price" when a customer used a credit card, 15 U.S.C. 1602(q) (1982), the new definition made clear that a scheme in which a merchant charged more to credit-card customers would be considered a surcharge (and thus impermissible) only when the merchant displayed the lower cash price in dollars and cents without doing the same for the higher credit-card price. See Pet. App. 15a ("The federal surcharge ban * * * could never be violated unless the seller 'tagged or posted' a single price."). If the merchant listed both prices in dollars-and-cents form, TILA would define the credit-card price as the "regular price," so no increase above the "regular price" would occur and the pricing differential would be considered a permissible discount. The statute likewise permitted a merchant to list *only* the credit-card price, while charging cash customers a lower amount, without violating the surcharge prohibition. In that circumstance as well, the credit-card price would *be* the "regular price" as that term was defined in the statute, and no increase over the regular price would occur.

The Senate Report accompanying the 1981 legislation explained that the temporary surcharge rule was "intend[ed] to assure that consumers will be seeing at least the highest possible price they will have to pay when they see a tagged or posted price." 1981 Senate Report 4. The statute "permit[ted] merchants to have two-tier pricing systems," "to offer a differential between the credit price and the cash price," and "to choose the manner and method by which they will tag

or post these prices," so long as "when prices are tagged or posted, the consumers will be exposed to the highest price." *Ibid.* The purpose of that approach was to ensure that merchants "cannot implement two-tier pricing systems which deceive or mislead the consumer." *Ibid.* "In other words, consumers cannot be lured into an establishment on the basis of the 'low, rock-bottom price' only to find at the cash register that the price will be higher if a credit card is used." *Ibid.*

e. In 1984, TILA's temporary surcharge rule expired, and Congress has not renewed it. Pet. App. 7a. Other provisions concerning higher prices for credit-card customers—prohibiting credit-card issuers from contractually barring cash discounts, 15 U.S.C. 1666f(a); excepting certain clearly and conspicuously disclosed discounts from the definition of a "finance charge" and from state laws, 15 U.S.C. 1666f(b), 1666j(c); and defining relevant terms, see 15 U.S.C. 1602(q), (r), and (y)—remain in the statute. Under current TILA regulations, however, the disclosure requirements applicable when merchants impose credit-card surcharges at the point of sale are no more exacting than the disclosure requirements that apply when merchants provide cash discounts. See 15 U.S.C. 1666f(b) (requiring "clear[] and conspicuous[]" disclosure of discounts); 12 C.F.R. 1026.5(a)(1)(A), 1026.9(d)(1) (requiring only prior oral disclosure when someone other than card issuer imposes a finance charge, such as a credit-card surcharge, at the point of sale).

3. a. Following the expiration of the federal surcharge rule, various States, including New York, enacted their own surcharge laws. Pet. App. 7a. New

York's law, N.Y. Gen. Bus. Law § 518 (McKinney 2012), makes it a misdemeanor criminal offense for a seller to "impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means." Although Section 518's "operative language is essentially identical" to the expired federal surcharge rule, the state law "does not incorporate its federal counterpart's explicit definitions of 'surcharge,' 'discount,' and 'regular price.'" Pet. App. 7a-8a.

b. Petitioners are New York-based businesses, owners, and managers who allege that they "would like to impose a credit-card surcharge, as opposed to offering a cash discount," on prices they charge to their customers. Pet. App. 11a. They claim that they are chilled from doing so by Section 518, and that the state law both violates the First Amendment and is unconstitutionally vague. *Id.* at 10a-11a.

Two petitioners have indicated that they want to display only the price for cash customers, and not the price for credit-card customers, in dollars-and-cents form, accompanied by a proviso stating that a "surcharge" (of, say, three percent) applies to customers who pay by credit card. Pet. App. 11a. One of those petitioners also alleges that, although it currently displays both cash and credit-card prices in dollars-and-cents form, it "fears that it will be prosecuted under Section 518 simply for characterizing that price difference as a 'surcharge' or an 'extra' charge for paying with a credit card." *Id.* at 29a (citation and internal quotation marks omitted).

c. Petitioners brought suit in federal district court against respondent state and local officials. The district court ultimately granted permanent injunctive

relief precluding respondents from enforcing Section 518 against petitioners. Pet. App. 48a-85a.

Based on Section 518's "plain text," Pet. App. 69a, its omission of analogues to TILA's definitions of "the terms 'surcharge,' 'discount,' and 'regular price,'" *id.* at 71a, and a history of "enforcement actions under section 518 * * * inconsistent with [those] federal definitions," *ibid.*, the district court construed the challenged state law to be substantially broader than the expired federal surcharge rule. *Id.* at 68a-72a. In the court's view, even a merchant who displays cash and credit-card prices with "equal prominence" could "legitimately fear prosecution" under Section 518 for describing the difference between the two prices as a "surcharge." *Id.* at 70a. The court also stated that, even under a narrowing construction of Section 518 proffered by respondents, Section 518 would function as "an *anti*-disclosure statute" that would "bar a seller from disclosing its cash price even marginally more conspicuously than its credit-card price." *Id.* at 75a.

The district court concluded that Section 518 "clearly regulates speech, * * * and does so by banning disfavored expression." Pet. App. 73a. It declined to analyze the law's constitutionality using the "lenient standard of review" applicable to consumer-disclosure laws under *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985). Pet. App. 75a. The court instead treated the law as a prohibition of commercial speech and found it unconstitutional under the test set forth in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980). Pet. App. 75a-79a. The district court also concluded that, "to the extent liability under section 518 turns on the labels that sellers use to describe

their prices, the statute is impermissibly vague." *Id.* at 80a.

d. Respondents appealed, but did not renew their contention that Section 518 is valid under *Zauderer* as a reasonable consumer-disclosure law. See Pet. App. 18a & n.7; Resp. C.A. Br. 24-54; Resp. C.A. Reply Br. 3-25. The court of appeals vacated and remanded with instructions to dismiss petitioners' claims. Pet. App. 1a-47a.

The court of appeals concluded that Section 518, as applied to prohibit a seller from posting a single sticker price accompanied by a proviso about an additional percentage surcharge for using a credit card, does not violate the First Amendment. Pet. App. 18a-28a; see *id.* at 14a-15a. The court understood Section 518, in that context, to "regulate[] conduct"—namely, "a pricing practice"—"not speech." *Id.* at 27a. The court proceeded "from the premise—conceded by [petitioners]—that prices, although necessarily communicated through language, do not rank as 'speech' within the meaning of the First Amendment." *Id.* at 19a. The court reasoned that, as applied to the display of a single price, "[w]hat Section 518 regulates—all that it regulates—is the difference between a seller's sticker price and the ultimate price that it charges to credit-card customers." *Id.* at 21a-22a. The court additionally held that Section 518 is not unconstitutionally vague in that context. *Id.* at 42a-45a.

The court of appeals abstained, under *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496 (1941), from deciding whether Section 518 is constitutional as applied to merchants who post separate cash and credit-card prices, or who do not post a price at all. Pet. App. 28a-40a, 45a. The court viewed abstention as

appropriate in light of the court's uncertainty about whether Section 518 "has any applications outside the single-sticker-price context." *Id.* at 36a. The court recognized that TILA's expired surcharge rule had no such applications, *id.* at 31a, but found a "dearth of authority" in the state courts about whether "Section 518 has a broader reach than the federal statute did," *id.* at 32a. The court refused to decide the case based on "speculation that the New York courts might give [Section 518] an expansive and arguably problematic reading." *Id.* at 36a. At the same time, however, the court "decline[d] to speculate" that the state courts would necessarily adopt a narrower construction. *Id.* at 37a. It noted, in particular, that although respondents had "invite[d]" it "to construe Section 518 as being identical to its lapsed federal counterpart if necessary to avoid constitutional difficulties, [respondents] never quite abandon[ed] the position that Section 518 might apply in the absence of a single sticker price." *Id.* at 37a n.13.

SUMMARY OF ARGUMENT

The court of appeals did not correctly analyze petitioners' challenge to N.Y. Gen. Bus. Law § 518. As applied here, Section 518 is properly viewed as a regulation of speech. That state statute may be constitutional, however, either as a permissible consumer-disclosure law (like the former federal surcharge rule), or on some alternative ground. The Court should remand the case for the court of appeals to undertake the appropriate analysis in the first instance.

I. This Court has consistently distinguished economic regulation, which is not subject to First Amendment scrutiny even when it has an indirect effect on

speech, from regulation of speech, which is subject to varying degrees of First Amendment scrutiny depending on the context. Examples of economic regulation include a law that limits a seller's ability to set the price of a good or service, a law that specifies the content or quality of the good or service that the seller provides, or a law that treats a seller's contractual offers as having legally binding effect. Section 518's application here, in contrast, is a regulation of speech, because it addresses the manner in which a merchant may present its pricing scheme to the public.

II. The fact that Section 518 regulates speech does not mean that it is unconstitutional. This Court has reviewed laws directed at commercial speech, such as the advertisement of prices, in a manner that respects the government's broad prerogatives in regulating commerce. In particular, a law requiring only that commercial actors make specified truthful disclosures is constitutional if the "disclosure requirements are reasonably related to the [government's] interest in preventing deception of consumers." *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

Under that standard, TILA's expired surcharge rule, 15 U.S.C. 1666f(a)(2) (1982), which required merchants who displayed a cash price to display any higher credit-card price as well, was a valid consumer-disclosure law. Congress could reasonably seek to prevent consumers from being misled by the display of a single unqualified cash price by requiring merchants to disclose their higher credit-card price up front, in dollars-and-cents form. That requirement ensured that customers would receive pricing information in a consistent and easily digestible form,

while allowing merchants to characterize the higher prices as including a "surcharge" or to attempt in other ways to influence customer behavior regarding the use of credit cards.

III. Although the prior TILA surcharge rule was a valid consumer-disclosure requirement, and Section 518 was modeled after that federal provision, respondents did not ask the court of appeals to analyze Section 518 as a consumer-disclosure law. In addition, unresolved questions exist concerning the scope of Section 518's coverage, and resolution of those issues may affect the determination whether Section 518 is constitutional in all of its applications. Consideration of those issues, as well as any additional statutory or constitutional analysis necessary to adjudicate petitioners' claims, would be best conducted by the court of appeals on remand.

ARGUMENT

New York's ban on credit-card surcharges, N.Y. Gen. Bus. Law § 518, prohibits a merchant who posts a single price for an item from charging more than the posted price to a customer who elects to pay by credit card rather than cash. See Pet. App. 14a-15a. Because petitioners' potential liability under Section 518 turns solely on how they would present a lawful pricing differential to consumers, the statute is properly analyzed as a regulation of speech. But to the extent that Section 518 (like the federal surcharge rule that preceded it) simply requires up-front disclosure in dollars and cents of higher prices charged to credit-card customers, it would impose a reasonable and therefore constitutional consumer-disclosure requirement under *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 650-653 (1985). It is unclear, howev-

er, whether the scope of the state law is so limited, and a consumer-disclosure rationale was neither pressed nor passed upon in the court of appeals. This Court should accordingly vacate the judgment below and remand for further proceedings.

I. SECTION 518 REGULATES PETITIONERS' SPEECH

A. Regulation Of Economic Conduct Is Not Regulation Of Speech

Economic regulation of commercial transactions, including regulation of the prices that sellers may charge, is not in itself regulation of speech. "[I]t has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeeper, &c., and in so doing to fix a maximum charge to be made for services rendered, accommodations furnished, and articles sold." *Munn* v. *Illinois*, 94 U.S. 113, 125 (1877). Consistent with the long history of such laws coexisting with the First Amendment, this Court has viewed them as "non-speech-related" forms of regulation that do not raise any First Amendment concerns. *Thompson* v. *Western States Med. Ctr.*, 535 U.S. 357, 372 (2002) (describing limits on drug sales as a constitutionally unproblematic alternative to unconstitutional restrictions on drug advertising); see *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 507 (1996) (plurality opinion) (viewing "direct regulation" to compel "higher prices," or to limit purchases, as "not involv[ing] any restriction on speech"); *id.* at 524 (Thomas, J., concurring in part and concurring in the judgment) (viewing "directly banning a product, * * * controlling its price, or otherwise restricting its sale in specific ways" as "involving no restriction on

speech regarding lawful activity"); *id.* at 530 (O'Connor, J., concurring in the judgment) (viewing restrictions on prices and sales to be consistent with the First Amendment).

B. Laws Regulating Commercial Transactions Are Subject To First Amendment Scrutiny Only When They Have A Non-Incidental Effect On Protected Speech

Even when the regulation of a commercial transaction affects speech, it does not necessarily lose its economic character. As many of this Court's decisions illustrate, "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Sorrell* v. *IMS Health, Inc.*, 564 U.S. 552, 567 (2011).

For example, the Court has found it "beyond dispute" that the application to newspaper publishing of "generally applicable economic regulations," such as antitrust or labor laws, does not "creat[e] constitutional problems." *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575, 581 (1983). More generally, "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006) (citation omitted). It is accordingly "well established that the Government may restrict speech without affronting the First Amendment" when "false claims are made to effect a fraud." *United States* v. *Alvarez*, 132 S. Ct. 2537, 2547 (2012) (plurality opinion) (citing *Virginia State Bd. of Pharm.* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976)).

In other contexts as well, the government may attach legal consequences to speech without triggering First Amendment concerns. Enforcement of contracts, for example, is unproblematic even though liability for any breach depends in part on what the breaching actor has previously promised to do. See, *e.g.*, Fredrick Schauer, *Categories and the First Amendment*, 34 Vand. L. Rev. 265, 270 (1981) (observing that, while parties "make contracts with speech," the First Amendment does not protect the right to "breach contracts"). And even when the common-law prerequisites to contract formation have not been satisfied, the government has broad latitude to require commercial actors to honor representations they have made to the public. A law that simply requires a merchant to honor particular representations *if he chooses to make them* is properly viewed as regulating economic conduct rather than speech.

When a commercial regulation "does not simply have an effect on speech," but is instead aimed more directly at protected speech, it warrants First Amendment scrutiny. *IMS Health*, 564 U.S. at 567; see, *e.g.*, *Wisconsin* v. *Mitchell*, 508 U.S. 476, 487 (1993) (distinguishing between a law "aimed at conduct unprotected by the First Amendment" and a law "explicitly directed at expression"). But even when a challenged law is of the latter sort, the type and stringency of First Amendment review turns in part on "the commonsense distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 562 (1980) (citation and internal quotation marks omitted); see,

e.g., *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618, 622-624 (1995); see also, *e.g.*, *Zauderer*, 471 U.S. at 651.

C. Because Section 518 Addresses The Manner In Which Merchants Must Describe Their Prices, That Provision Regulates Petitioners' Speech

In its application to the pricing schemes that petitioners desire to implement, Section 518 is not an economic regulation, but is instead a regulation of speech. It prescribes not the commercial practices a merchant must follow, but the way in which the merchant may communicate those practices to the public.

Although Section 518 might nominally be described as a prohibition on the conduct of "char[ging] an additional amount above the sticker price to * * * credit-card customers," Pet. App. 21a, its application to petitioners turns on the manner in which the "sticker price" conveys the merchant's pricing scheme. Under Section 518, a merchant is free to charge cash customers $100 and credit-card customers $103 for the same item. See *id.* at 14a. If the price tag displays a single dollars-and-cents price of $103, or (potentially) if both prices are displayed with equal prominence, the merchant is deemed to be granting a cash discount, which Section 518 permits. See *id.* at 14a-15a. But if the price tag displays a single dollars-and-cents price of $100, the merchant is deemed to be imposing a credit-card surcharge, which Section 518 forbids. See *ibid.* Because Section 518 addresses the *communication* of an otherwise-permissible pricing scheme, rather than the pricing scheme *itself*, it is properly considered a regulation of speech.

Contrary to the court of appeals' conclusion (Pet. App. 27a), Section 518's application here thus "differs

in a constitutionally significant way" from laws directed at commercial transactions. Section 518 does not "regulate prices," *ibid.*, in the same manner as a law that prohibits a merchant from charging different prices to cash customers and credit-card customers, or that limits the permissible amount of any such difference. See, *e.g.*, *National Ass'n of Tobacco Outlets, Inc.* v. *City of Providence*, 731 F.3d 71, 74, 76-78 & n.1 (1st Cir. 2013) (upholding, as economic regulation, prohibition on charging lower prices to customers with coupons or customers making higher-volume purchases) (cited at Pet. App. 24a, 26a). It also does not regulate the good or service being sold, as would a law requiring that a particular product be sold with a warranty. See, *e.g.*, 38 U.S.C. 3705(a) (requiring warranties for sale of certain homes to veterans). And it does not attach legal consequences to petitioners' commercial communications in a manner that might be analogized to contract law, as would a law that temporarily prohibited a merchant from altering previously offered prices. See, *e.g.*, N.Y. Gen. Bus. Law § 396-r(3)(b)(ii) (McKinney 2012) (anti-price-gouging law) (cited at Pet. App. 27a n.10); cf. 42 U.S.C. 1981 (prohibiting contract-related discrimination).

II. A LAW REQUIRING ONLY THAT SELLERS DISPLAY CREDIT-CARD PRICES ALONGSIDE CASH PRICES WOULD BE A VALID CONSUMER-DISCLOSURE REGULATION

As framed in the petition for a writ of certiorari, the question presented in this case assumes that Section 518 *either* "regulate[s] economic conduct" *or* "unconstitutionally restrict[s] speech." Pet. i. That is a false dichotomy. This Court has declined to interpret the First Amendment to "foreclose restrictions

on potentially or demonstrably misleading advertising," *In re R.M.J.*, 455 U.S. 191, 202 (1982), and has applied a form of reasonableness review to uphold disclosure requirements aimed at preventing consumers from misapprehending the terms of a commercial transaction, see *Milavetz, Gallop & Milavetz, P.A.* v. *United States*, 559 U.S. 229, 248-253 (2010); *Zauderer*, 471 U.S. at 650-653. A law of that sort may be directed at speech in a way that subjects it to First Amendment scrutiny, yet nevertheless survive First Amendment review. The expired federal surcharge rule, 15 U.S.C. 1666f(a)(2) (1982), which "assure[d] that consumers w[ould] be seeing at least the highest possible price they w[ould] have to pay when they s[aw] a tagged or posted price," 1981 Senate Report 4, and on which Section 518 was at least partially modeled, see Pet. App. 7a-8a, was constitutional under that standard.

A. A Consumer-Disclosure Requirement Is Valid Under The First Amendment If It Is Reasonably Related To Preventing Consumers From Being Misled

This Court has described "advertising the price of a product" as "typical commercial speech." *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 576 (1988). The degree of scrutiny that applies to regulation of such speech "turns on the nature both of the expression and of the governmental interests served by its regulation." *Central Hudson*, 447 U.S. at 563. In particular, the Court has distinguished between "restrictions on nonmisleading commercial speech regarding lawful activity," which "must withstand intermediate scrutiny," and "disclosure requirement[s]" aimed at preventing the public from being misled, which are sub-

ject to "less exacting scrutiny." *Milavetz*, 559 U.S. at 249; cf., *e.g.*, *American Meat Inst.* v. *United States Dep't of Agric.*, 760 F.3d 18, 21-27 (D.C. Cir. 2014) (en banc) (discussing reasons for applying lesser scrutiny to consumer-disclosure laws serving other governmental interests).

In *Zauderer*, this Court applied that distinction to reject a First Amendment challenge to a requirement that an attorney's advertisement disclose certain costs that clients might incur. See 471 U.S. at 650-653. The Court emphasized the "material differences between disclosure requirements and outright prohibitions on speech." *Id.* at 650. The Court recognized that disclosure requirements do "not attempt[] to prevent [advertisers] from conveying information to the public," but "only require[] them to provide somewhat more information than they might otherwise be inclined to present." *Ibid.* The Court explained that such requirements "trench much more narrowly on an advertiser's interests than do flat prohibitions on speech," because an advertiser's "constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal." *Id.* at 651.

The *Zauderer* Court reiterated the principle, which it had "emphasized" in "virtually all" of its prior "commercial speech decisions," that "'warnings or disclaimers might be appropriately required'" for particular commercial speech "'in order to dissipate the possibility of consumer confusion or deception.'" *Zauderer*, 471 U.S. at 651 (quoting *In re R.M.J.*, 455 U.S. at 201) (brackets omitted). While acknowledging advertisers' interest in avoiding "unjustified or unduly burdensome disclosure requirements," which might "chill[] protected commercial speech," the Court held

that "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the [government's] interest in preventing deception of consumers." *Ibid.* Applying that standard to the case before it, the Court described as "deceptive" an advertisement that, although technically accurate, "'had a tendency to mislead.'" *Id.* at 653 (citation and internal quotation marks omitted); see *id.* at 652.

The Court reaffirmed and expanded upon *Zauderer*'s approach in *Milavetz*, *supra*, which upheld statutory requirements for particular disclosures in a law firm's advertisements for certain services. 559 U.S. at 248-253; see *id.* at 233-234. The government in *Milavetz* had "adduced no evidence" that the particular advertisements at issue in the case were misleading. *Id.* at 251. Based on legislative materials showing an overall "pattern of advertisements" that omitted the relevant information, however, the Court found that "the likelihood of deception in these cases 'is hardly a speculative one.'" *Ibid.* (quoting *Zauderer*, 471 U.S. at 652). The Court accordingly viewed the disclosure requirements as a reasonable measure "intended to combat the problem of inherently misleading commercial advertisements." *Id.* at 250.

B. The Expired Federal Surcharge Rule Was A Constitutional Consumer-Disclosure Law

Under the principles set forth in *Zauderer* and *Milavetz*, TILA's now-expired surcharge rule, 15 U.S.C. 1666f(a)(2) (1982), was constitutional. Although it was not explicitly labeled a consumer-disclosure law, the federal surcharge rule operated, and appears to have been intended to operate, to ensure that consumers were adequately informed about

merchants' pricing practices. See 1981 Senate Report 4; see also *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 652 (1994) (subjective motives of legislature irrelevant to constitutional analysis). In particular, the federal rule "permit[ted] merchants * * * to offer a differential between the credit price and the cash price," while "[p]reclud[ing] * * * the possibility that a merchant w[ould] tag or post only the lower price, and thereby charge the customer who pa[id] by credit card a higher price than disclosed." 1981 Senate Report 4.

1. The federal surcharge rule, like Section 518, prohibited "a surcharge on a cardholder who elects to use a credit card." 15 U.S.C. 1666f(a)(2) (1982). Unlike Section 518, however, that federal law contained express definitions of the relevant terms, which made clear that the federal surcharge rule functioned solely as a disclosure requirement.

Pursuant to those definitions, a merchant violated the federal surcharge rule if, but only if, it charged a higher price to credit-card customers, yet displayed only a lower cash price without also displaying the higher credit-card price. TILA defined a "surcharge" as "any means of increasing the regular price to a cardholder" for using a credit card. 15 U.S.C. 1602(q) (1982). Under that definition, no surcharge occurred when the price charged to a credit-card customer equaled the "regular price." *Ibid.* And TILA defined the "regular price" to *be* the credit-card price "if either (1) no price is tagged or posted, or (2) two prices are tagged or posted," one of which is the credit-card price and the other the cash price. 15 U.S.C. 1602(x) (1982). Thus, the only circumstance in which the regular price was *not* the credit-card price—and therefore

the only circumstance in which a "surcharge" could occur—was when the merchant charged different prices to cash and credit-card customers but posted only the lower cash price. See *ibid.*; Pet. App. 15a ("The federal surcharge ban * * * could never be violated unless the seller 'tagged or posted' a single price.").

The federal surcharge rule thus allowed merchants substantial latitude to "choose the manner and method by which they w[ould] tag or post [their] prices." 1981 Senate Report 4. The only constraint was that, "when prices [were] tagged or posted," consumers had to "be exposed to the highest price." *Ibid.*

2. The federal surcharge rule's disclosure requirement was "reasonably related to the [government's] interest in preventing deception of consumers." *Zauderer*, 471 U.S. at 651. Like the provisions upheld in *Milavetz*, TILA's former surcharge rule "share[d] all the essential features of the rule at issue in *Zauderer*." *Milavetz*, 559 U.S. at 250.

First, as in *Zauderer*, the disclosure required by the former TILA rule "entail[ed] only an accurate statement." *Milavetz*, 559 U.S. at 250. The price a merchant charges to credit-card customers is "purely factual and uncontroversial information about the terms under which [its] services," or its goods, "will be available." *Zauderer*, 471 U.S. at 651.

Second, as in *Zauderer*, the "required disclosure[]" in the federal surcharge rule was "intended to combat the problem of inherently misleading commercial advertisements." *Milavetz*, 559 U.S. at 250. Congress reasonably determined that disclosing only the lower cash price, without notification of the higher credit-card price, could "deceive or mislead the consumer."

1981 Senate Report 4. Under such a scheme, a consumer could "be lured into an establishment on the basis of a 'low, rock-bottom price' only to find at the cash register that the price w[ould] be higher if a credit card [were] used." *Ibid.* Particularly given the testimony that Congress had previously received on the issue of consumer confusion and misperception, see pp. 4-5, *supra*, "the likelihood of" such "deception" was "'hardly * * * speculative.'" *Milavetz*, 559 U.S. at 251 (quoting *Zauderer*, 471 U.S. at 652).

Finally, as in *Zauderer*, the federal surcharge rule "d[id] not prevent" regulated persons "from conveying any additional information," *Milavetz*, 559 U.S. at 250, that they might wish to present. So long as a merchant disclosed its higher credit-card price, the surcharge rule permitted merchants to describe or discuss their pricing schemes in any manner they wished. Nothing in TILA prohibited a merchant from describing the higher credit-card price as including a "surcharge." TILA likewise allowed a merchant to explain that the added amount reflected the merchant's own obligation to remit a percentage of the purchase price to the credit-card issuer, to criticize the credit-card issuer for assessing such a fee, or to exhort customers to pay in cash and deny the credit-card issuer a share of the proceeds.

3. Like many disclosure laws, including the ones upheld in *Milavetz*, see 559 U.S. at 233-234, the federal surcharge rule prescribed a particular format for making the required disclosure. The interaction between the rule and the definition of "regular price" required that the credit-card price be "tagged or posted" as a "price"—*i.e.*, the specific amount, in dollars and cents, that the merchant would charge to a credit-

card customer. 15 U.S.C. 1602(x) (1982); see 15 U.S.C. 1666f(a)(2) (1982). That prescription did not affect the law's constitutionality.

The First Amendment did not require Congress to acquiesce in the desire of merchants who, like petitioners, might have preferred to display only the cash price as a price, and to communicate the additional charge for credit-card purchases solely as a mathematical formula—*e.g.*, a "3% credit-card surcharge," Pet. App. 11a (citation omitted). Nor was Congress required to allow the cash price to be displayed more "conspicuously," *id.* at 75a, than the credit-card price. The authority of the government to require "warnings or disclaimers * * * in order to dissipate the possibility of consumer confusion or deception," *Zauderer*, 471 U.S. at 651 (citation and brackets omitted), includes the power to make a reasonable judgment that one manner of conveying information is likely to be clearer than another.

Thus, in *Zauderer*, the State could require certain explicit disclosures in the context of an advertisement that was technically truthful, subject to the application of a reasonableness standard designed to ensure that the disclosure was not "unjustified or unduly burdensome." 471 U.S. at 651; see *id.* at 652; see *id.* at 653 n.15 (rejecting argument that disclosure requirement was unduly burdensome as applied). If that standard is satisfied, the government need not litigate the adequacy of every alternative form of words that some regulated party might prefer. See *Milavetz*, 559 U.S. at 251 (rejecting challenge to disclosure requirement that "amount[ed] to little more than a preference on [the challenger's] part" for a differently worded statement).

In enacting and revising the federal surcharge rule, Congress reasonably determined that disclosure of the credit-card price as a price, in circumstances where the merchant has already chosen to communicate the cash price as a price, was the best way to avoid consumer deception and confusion. Congress had been informed that "different types of pricing systems from one store to the next may tend to confuse consumers," and that "consumers could find" it "burdensome and confusing" to perform a "mathematical computation" in order to compare prices. *1975 Senate Hearing* 8 (statement of Federal Reserve Board member); see *id.* at 123 (consumer advocate urging that "[c]onsumers should not have to endure the confusion which would result from a wide variety of methods of advertising the price of an item"). A consumer might find it difficult or burdensome to determine the actual cost of an appliance advertised at $369 with a 3.5% credit-card surcharge, or to compare that cost to the cost of the same appliance advertised at $379 at the store across town. To facilitate informed purchasing decisions by consumers, Congress could reasonably require that higher credit-card prices be presented in a concrete and familiar form.

4. Congress could also permissibly focus on one specific type of potential consumer confusion—namely, confusion about additional charges for using a credit card—without simultaneously regulating other aspects of how merchants advertise their prices. This Court has rejected the "argument that a disclosure requirement is subject to attack if it is 'underinclusive'—that is, if it does not get at all facets of the problem it is designed to ameliorate." *Zauderer*, 471 U.S. at 652 n.14. "As a general matter, governments are entitled

to attack problems piecemeal, save where their policies implicate rights so fundamental that strict scrutiny must be applied. The right of a commercial speaker not to divulge accurate information regarding his services is not such a fundamental right." *Ibid.* (citation omitted).

The federal surcharge rule was therefore constitutional notwithstanding the absence of similar disclosure requirements for other types of charges, like sales tax, that would affect the total amount paid to purchase an item. Congress could also permissibly differentiate between "surcharge[s]" resulting in credit-card customers paying *more* than the posted price (which had to be disclosed by displaying the credit-card price, see 15 U.S.C. 1666f(a)(2) (1982)) and "discount[s]" resulting in cash customers paying *less* than the posted price (which could potentially be disclosed in other ways, so long as the disclosure was "clear[] and conspicuous[]," 15 U.S.C. 1666f(b) (1982)). Congress enacted the TILA surcharge rule after being informed that "the disclosure problem" is "aggravate[d]" in the former circumstance, which presents the possibility of "something akin to the troublesome 'bait and switch' technique," in which a customer is enticed by a misleadingly low price. *1975 Senate Hearing* 86 (statement of banking organizations). In the latter circumstance, by contrast, the customer will, "at worst," "arrive[] at a store" to find "that the cash price is *lower* than was advertised." *Ibid.*

The federal surcharge rule's targeted disclosure requirement was different from the "content-based restrictions on speech," like the differential regulation of signs with different messages that the Court recently invalidated in *Reed* v. *Town of Gilbert*, 135

S. Ct. 2218 (2015), that are subject to "strict scrutiny," *id.* at 2231; see *id.* at 2224. The Court's rejection of underinclusivity challenges to consumer-disclosure laws, see *Zauderer*, 471 U.S. at 652 n.14, accords with the broader principle that distinctions in the context of commercial speech are "neutral enough" to avoid strict scrutiny when they are premised on "one of the characteristics of commercial speech"—here, its potential to mislead—that "justifies depriving [commercial speech] of full First Amendment protection" in the first place, *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 388 (1992). Thus, "a State may choose to regulate price advertising in one industry but not in others, because the risk of fraud . . . is in its view greater there." *IMS Health*, 564 U.S. at 579 (quoting *R.A.V.*, 505 U.S. at 388-389); see *ibid.* (observing that the "principle" that "content-based restrictions on protected expression are sometimes permissible * * * applies to commercial speech"). And, as explained above, the former TILA rule also differed from typical "restrictions on speech" in that it did not forbid the communication of any information that a merchant wished to convey. Rather, it simply required the provision of *additional* information (the credit-card price, stated as a price) if the merchant engaged in differential pricing and chose to post the lower cash price.

5. As with any "warning[]," "disclaimer[]," or other type of disclosure that the government might reasonably require, *Zauderer*, 471 U.S. at 651 (citation omitted), the disclosure previously mandated by the federal surcharge rule could have affected a consumer's perception of a proposed commercial transaction and his willingness to engage in it. But because any such

effect would be the result of additional truthful information that Congress reasonably deemed necessary to prevent consumers from being confused or misled, the rule was consonant with the First Amendment.

The disclosure requirements in *Zauderer*, for example, were held to be constitutional even though many prospective clients would doubtless be warier of engaging an attorney's services if informed about additional potential costs. See 471 U.S. at 650-653. That approach recognizes that "protection for commercial speech is justified in large part by the information's value to consumers," *Milavetz*, 559 U.S. at 249, and reflects that "disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information," *Ibanez* v. *Florida Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 142 (1994) (citation and internal quotation marks omitted).

The Court's approach also recognizes that consumer-disclosure laws leave ample room for a regulated entity to use its preferred terms to characterize a transaction. See *Milavetz*, 559 U.S. at 249. The *Zauderer* standard applies only to the extent that a law requires the effective disclosure of information. To the extent that a law limits a regulated entity's ability to provide "additional information" that is neither false or misleading, the law is subject to more exacting First Amendment scrutiny. *Id.* at 250. In this case, for example, petitioners wish to discourage credit-card purchases by describing higher credit-card prices as a penalty and taking advantage of a psychological propensity to attach higher priority to avoiding losses than to achieving gains. See Pet. Br. 6-8. Under the former TILA surcharge rule, they would have been

free to do so. Any law that prohibited the use of such terms would be analyzed under *Central Hudson* rather than under *Zauderer*, and it would require a justification separate from the government interests that underlay the federal surcharge rule. See, *e.g.*, *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 480-491 (1995) (applying *Central Hudson* to ban on displaying alcohol content on beer labels).

6. Petitioners err in suggesting (Br. 48-49) that the former federal law was unconstitutionally vague. The constitutional vagueness inquiry turns not on whether there is an abstract "economic distinction" between surcharges and discounts, Pet. Br. 48 (citation omitted), or on whether people might seek agency guidance in some circumstances, *id.* at 13 n.3, 48-49, but instead on whether the law itself "provide[s] a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 18 (2010) (*HLP*) (quoting *United States* v. *Williams*, 553 U.S. 285, 304 (2008)). The language in the federal surcharge rule bore no resemblance to "the sorts of terms," involving "'wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings,'" that this Court "ha[s] previously declared to be vague." *Id.* at 20 (quoting *Williams*, 553 U.S. at 306).

As discussed above, the statutory definitions made clear that what was prohibited was to "tag or post[]" the cash "price" without similarly "tag[ging] or post[ing]" any higher credit-card "price." 15 U.S.C. 1602(x) (1982); see *HLP*, 561 U.S. at 21 (relying on statutory definitions in rejecting vagueness chal-

lenge). Even if there were some ambiguity on the margins as to what constituted "tag[ging]" or "post[ing]," see, *e.g.*, 43 Fed. Reg. 3899 (Jan. 30, 1978) (addressing "unique" situation of gas stations under Federal Reserve regulations), "perfect clarity and precise guidance have never been required even of regulations that *restrict* expressive activity," *Williams*, 553 U.S. at 304 (quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 794 (1989)) (emphasis added), let alone consumer-disclosure laws.

III. THIS CASE SHOULD BE REMANDED FOR FURTHER CONSIDERATION OF THE SCOPE OF, AND JUSTIFICATIONS FOR, SECTION 518

Although New York's Section 518 was modeled on a prior federal law (the expired TILA surcharge rule) that was constitutional under the *Zauderer* framework, it does not necessarily follow that the less-specific state law is likewise valid. Respondents argued in the district court that Section 518 is a consumer-disclosure law subject to reasonableness review under *Zauderer*, but they did not renew that argument in the court of appeals. Compare, *e.g.*, 13-cv-03775 Docket entry No. 27, at 38-39 (S.D.N.Y. July 12, 2013) (motion to dismiss), with, *e.g.*, Resp. C.A. Br. 24-54. And *Zauderer*'s application to Section 518 depends on the resolution of an antecedent (and currently unresolved) issue of statutory construction—*i.e.*, whether Section 518 forbids the use of terms like "surcharge" or "penalty" to describe a merchant's pricing differential, even when both the credit-card price and the cash price are disclosed to consumers.

Respondents contend (Br. in Opp. 3) that "the [New York] Legislature made clear that [Section 518] should be construed identically to the prior federal

law." But Section 518 omits the relevant definitional provisions of TILA, and respondents appear to acknowledge that the state courts might construe it more broadly than its federal predecessor. See *id.* at 19-20; see also *People* v. *Fulvio*, 517 N.Y.S.2d 1008, 1015 (N.Y. Crim. Ct. 1987) (stating that a merchant "faces the prospect of criminal conviction" for "describ[ing] the higher price in terms which amount to the 'credit price' having been derived from adding a charge to the lower price") (emphasis omitted). The district court refused to interpret Section 518 to be congruent to the expired federal surcharge rule, concluding, *inter alia*, that such a construction "strays markedly from the ordinary plain meaning of [Section 518's] text." Pet. App. 80a; see *id.* at 68a-72a. The court of appeals declined to resolve that interpretive issue, and it accordingly abstained from deciding whether a state law that prohibited the use of terms like "surcharge" or "penalty" would violate the First Amendment. See *id.* at 28a-40a; see also *id.* at 37a n.13 (observing that respondents had "never quite abandon[ed] the position that Section 518 might apply in the absence of a single sticker price"). It also abstained from addressing petitioners' vagueness challenge. *Id.* at 45a.

This Court is "a court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). The Court would provide an appropriate level of guidance on the question presented in this case by clarifying that Section 518 regulates speech, but that a sufficiently specific law requiring only that a merchant display a credit-card price alongside a cash price would be a valid consumer-disclosure regulation. The Court could then remand for the court of appeals,

which is particularly well-situated to address (or certify) questions of state law, see, *e.g.*, *Butner* v. *United States*, 440 U.S. 48, 58 (1979), to determine the grounds on which respondents are defending Section 518 and to evaluate the statute's constitutionality in light of those defenses.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

IAN HEATH GERSHENGORN
Acting Solicitor General
BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
ERIC J. FEIGIN
Assistant to the Solicitor General
SCOTT R. MCINTOSH
JOSHUA M. SALZMAN
Attorneys

NOVEMBER 2016

APPENDIX

1. N.Y. Gen. Bus. Law § 518 (McKinney 2012) provides:

Credit card surcharge prohibited

No seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means.

Any seller who violates the provisions of this section shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars or a term of imprisonment up to one year, or both.

2. 15 U.S.C. 1602 (1982) provided in pertinent part:

Definitions and rules of construction

* * * * *

(k) The term "credit card" means any card, plate, coupon book or other credit device existing for the purpose of obtaining money, property, labor, or services on credit.

* * * * *

(m) The term "cardholder" means any person to whom a credit card is issued or any person who has agreed with the card issuer to pay obligations arising from the issuance of a credit card to another person.

(n) The term "card issuer" means any person who issues a credit card, or the agent of such person with respect to such card.

* * * * *

(p) The term "discount" as used in section 1666f of this title means a reduction made from the regular price. The term "discount" as used in section 1666f of this title shall not mean a surcharge.

(q) The term "surcharge" as used in this section and section 1666f of this title means any means of increasing the regular price to a cardholder which is not imposed upon customers paying by cash, check, or similar means."

* * * * *

(x) As used in this section and section 1666f of this title, the term "regular price" means the tag or posted price charged for the property or service if a single price is tagged or posted, or the price charged for the property or service when payment is made by use of an open-end credit plan or a credit card if either (1) no price is tagged or posted, or (2) two prices are tagged or posted, one of which is charged when payment is made by use of an open-end credit plan or a credit card and the other when payment is made by use of cash, check, or similar means. For purposes of this definition, payment by check, draft, or other negotiable instrument which may result in the debiting of an open-end credit plan or a credit cardholder's open-end account shall not be considered payment made by use of the plan or the account.

* * * * *

3. 15 U.S.C. 1666f (1982) provided:

Inducements to cardholders by sellers of cash discounts for payments by cash, check or similar means; credit card surcharge prohibition; finance charge for sales transactions involving cash discounts

(a) Cash discounts

(1) With respect to credit card which may be used for extensions of credit in sales transactions in which the seller is a person other than the card issuer, the card issuer may not, by contract, or otherwise, prohibit any such seller from offering a discount to a cardholder to induce the cardholder to pay by cash, check, or similar means rather than use a credit card.

(2) No seller in any sales transaction may impose a surcharge on a cardholder who elects to use a credit card in lieu of payment by cash, check, or similar means.

(b) Finance charge

With respect to any sales transaction, any discount from the regular price offered by the seller for the purpose of inducing payment by cash, checks, or other means not involving the use of an open-end credit plan or a credit card shall not constitute a finance charge as determined under section 1605 of this title if such discount is offered to all prospective buyers and its availability is disclosed clearly and conspicuously.